

An appeal

- by -

Prospect Import & Export Inc.
(“Prospect”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2005A/152

DATE OF DECISION: October 20, 2005

DECISION

SUBMISSIONS

John Obasohan	for Prospect Import & Export Inc.
Jun Wang	on his own behalf
Glen Smale	for the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by John Obasohan, who I understand is a principal of Prospect Import & Export Inc. (“Prospect”), pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Even though Prospect is not the named appellant in the appeal form, I am prepared to proceed on the basis that Mr. Obasohan (who is not liable under the Determination) filed this appeal in a representative capacity (on behalf of Prospect).
2. The appeal concerns a Determination (and accompanying “Reasons for the Determination”) issued on April 6th, 2005 by a delegate of the Director of Employment Standards (the “delegate”). By way of the Determination, Prospect was ordered to pay its former employee, Jun Wang (“Wang”), the sum of \$2,271.15 on account of unpaid wages and section 88 interest. In addition, the Director’s delegate levied five separate \$500 administrative penalties (see section 98 of the *Act*) against Prospect based on its contravention of sections 18 (payment of wages on termination), 45 (statutory holiday pay) and 58 (vacation pay) of the *Act* and sections 37.3 (overtime for short- and long-haul truck drivers) and 46 (production of employment records) of the *Employment Standards Regulation*. Accordingly, the total amount payable under the Determination is \$4,771.15.
3. The appeal is based on the grounds that the Director’s delegate failed to observe the principles of natural justice in making the Determination [see section 112(1)(b) of the *Act*] and that evidence has now become available that was not available at the time the Determination was being made [section 112(1)(c) of the *Act*].
4. However, these reasons for decision do not address the merits of the appeal. Rather, there is a question about the timeliness of the appeal and, accordingly, that matter must first be adjudicated.

TIMELINESS OF THE APPEAL

5. An appeal of a determination must be filed, in writing, with the Tribunal within “30 days after the date of service of the determination, if the person was served by registered mail” [see section 112(3)(a) of the *Act*]. However, if the appeal is not filed within this latter statutory time limit, the Tribunal may extend the appeal period pursuant to section 109(1)(b) of the *Act*.
6. The Determination and the attached “Reasons for the Determination” (“Reasons”) were issued on April 6th, 2005. The delegate issued the Determination and Reasons following an investigation. The Determination and Reasons were mailed to Prospect’s business and registered/records office address in

Port Coquitlam. These latter documents were also mailed to the nominal appellant, Mr. Obasohan, and to two other individuals who I understand are Prospect directors and/or officers.

7. The Determination contains a Notice, at the bottom of page 3, relating to appeals and this Notice states that the appeal deadline was 4:30 P.M. on May 16th, 2005. I presume that this deadline was calculated taking into account the “deemed service” provision contained in section 122(2) of the *Act*. Accordingly, the actual appeal period may have expired (and, in this case, apparently *did* expire) before May 16th, 2005 depending on when the registered envelope containing the Determination and Reasons was actually received at Prospect’s registered and records office. The Appeal Form was filed with the Tribunal on August 25th, 2005—over three months after the deadline set out in the Determination expired.
8. Immediately upon the appeal being filed, the Tribunal’s Vice-Chair wrote to the parties and indicated that since the appeal was, on its face, filed after the expiration of the statutory appeal period, the Tribunal wished the parties to file written submissions regarding whether the appeal period should be extended. In her August 25th, 2005 letter to the parties, the Vice-Chair also summarized the various factors [derived from the Tribunal’s section 109(1)(b) jurisprudence] the Tribunal considers when ruling on an application to extend the appeal period. The parties were given until September 16th, 2005 to file their submissions on the “timeliness of the appeal” issue. I have before me submissions filed by the appellant, Mr. Wang and by the Director’s delegate.

THE PARTIES’ SUBMISSIONS

The Appellant

9. In a submission dated and filed September 16th, 2005, Mr. John “Oba-Sohan”, on behalf of Prospect, asserts that he was not aware of the Determination until the last week of July 2005 because these documents were misplaced by another party with whom he shared a mailbox:

“I could not repply [sic] to the correspondence sent to me because the tenant I share my letter box with was stocking all my mails [sic] away underneath his carpet and I could not have access to the mails that would have allow [sic] me to repply [sic] in a timely and reasonably manner.

those mails were being sent from the Employment standards office until the last week of July when the tenant moved out of the suit [sic] he occupied in the house and we were replacing the carpet only then I found that all mails [sic] sent to me for the past six months have been taken away by this individual...”

10. The balance of Mr. Oba-Sohan’s submission speaks solely to the merits of Mr. Wang’s complaint and the correctness of the delegate’s Determination. Mr. Obasohan also filed a further submission on October 6th, 2005 (after the deadline for submissions expired), however, this latter submission does not address the timeliness of the appeal.

Mr. Wang

11. In his September 14th, 2005 submission, Mr. Wang states that he opposes any extension of the appeal period and maintains that his unpaid wage complaint was correctly determined by the delegate.

The Director's Delegate

12. In his September 15th, 2005 submission, the Director's delegate makes several observations including:
- Mr. Obasohan lacks credibility as demonstrated by his dealings with the delegate during the investigation—among other things, Mr. Obasohan misrepresented the name of the corporate employer and his status with the employer.
 - Mr. Obasohan has demonstrated contempt for the entire adjudicative process as reflected by his refusal to accept registered mail, his refusal to reply to correspondence, his refusal to comply with demands for documents, and his issuance (and subsequent disavowal) of a payroll cheque that was dishonoured.
 - The Determination and Reasons were forwarded by registered mail on April 6th, 2005 and, accordingly, were deemed to have been received on April 14th, 2005 [see section 122(2) of the *Act*].
13. In sum, the delegate says the delay involved in this case is “unreasonable” and that the proffered explanation that the documents were “swept under the carpet” is “truly inconceivable”, “outlandish” and ultimately “unbelievable”.

FINDINGS AND ANALYSIS

14. I find myself in total agreement with the delegate's observation that the explanation offered in this case is wholly unbelievable. I am supposed to accept that, for some six months, Mr. Obasohan simply took no action, or made any inquiries, about why he was not receiving any mail. I am supposed to accept that his mail was taken (a criminal offence) and stashed away under a carpet by a tenant who shared Mr. Obasohan's mailbox. I find that explanation to be wholly unbelievable. At the very least, this latter explanation, if accepted (and I most certainly do not accept it), reflects an extraordinary lack of due diligence on Mr. Obasohan's part.
15. Further, even if one accepted Mr. Obasohan's explanation—and there is absolutely no corroborating evidence from this phantom tenant—I note that Mr. Obasohan acknowledges he obtained his mail in late July 2005. If that is so, why did he wait a further month or so to file his appeal? The record before me indicates a total lack of diligence on the appellant's part with respect to the filing of a timely appeal. One can fairly conclude, I believe, that this appeal was filed solely in response to a section 96 determination (director/officer liability for unpaid wages) that was issued against Mr. Obasohan personally—this latter section 96 determination apparently came to Mr. Obasohan's attention in early August 2005.
16. I might also add that I have reviewed the grounds of appeal, the delegate's Reasons, and the record that was before the delegate. In my view, even if this appeal were allowed to go forward, the grounds of appeal are not meritorious and, inevitably, the appeal would be dismissed.
17. Very briefly, I wish to summarize my views regarding the merits of the appeal. As noted above, the appellant says that the delegate failed to observe the principles of natural justice and that it has new evidence that was not available when the Determination was being made. As for the first ground, there does not appear to be anything before me to support this ground of appeal. The delegate gave the appellant a full and fair opportunity to present its position but, for the most part, the appellant failed to avail itself of that opportunity. As for the second ground, the appellant does not appear to have provided

any “new” evidence let alone evidence that would pass the evidentiary threshold set out in *Davies et al. (Merilus Technologies Inc.)*, B.C.E.S.T. Decision No. D171/03.

18. I now turn to the specific issues raised by the appellant in its material. The appellant says that the delegate erred in accepting the “made up” stories of Mr. Wang regarding the latter’s hours of work. However, in the absence of proper payroll records from the employer, the delegate was obliged to assess the evidence that was before him and I cannot conclude that he made an appealable error when he relied on Mr. Wang’s apparently credible records.
19. The appellant complains about the reimbursement ordered with respect to a wage deduction. The delegate quite properly ordered the reimbursement of a wage deduction made contrary to section 21 of the *Act*. Employers simply cannot act as “judge and executioner” by asserting a right to reimbursement for property damage allegedly caused by an employee and then deducting some amount from the employee’s wages on that account. A court or tribunal of competent jurisdiction must first determine the validity of an employer’s property damage claim; once the claim has been lawfully determined, the employer *may* have a lawful right to deduct or otherwise set off the determined amount but only in accordance with a court or tribunal order to that effect.
20. The appellant says that Mr. Wang was a subcontractor and not an employee—this issue was fully addressed by the delegate in his Reasons and I wholly adopt his conclusions on this particular point. Finally, the appellant says that the penalties are “too stiff”, however, the administrative penalty amounts are fixed by the *Employment Standards Regulation* and neither the delegate, nor this Tribunal, has the authority to reduce the mandated amounts. The record clearly indicates that the appellant contravened five separate provisions of the *Act* and *Regulation* and, accordingly, was liable for \$2,500 in administrative penalties.

ORDER

21. The application to extend the appeal period is refused.
22. Pursuant to section 114(1)(b)(c) and (f) of the *Act*, I order that the appeal be dismissed. It follows that the Determination is confirmed as issued in the amount of **\$4,771.15** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal